

CONSTITUTIONAL LAW REPORTER

Arizona Constitution

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Ariz. Const. art. 2, sec. 2.1(C). Victim's rights—Definition of "victim."

az.2.2.1.c.020 The elements of a crime do not necessarily determine whether a person qualifies as a "victim" under the statutory definition of the Victim's Bill of Rights.

State v. Lewis, 222 Ariz. 321, 214 P.3d 409, ¶ 6 n.4 (Ct. App. 2009) (as defendant was driving away from party with his brother and another in vehicle, someone at house fired at them; defendant and possibly his brother fired back, striking victim A; defendant was convicted of drive-by shooting and acquitted of aggravated assault; trial court ordered defendant to pay \$12,448.94 in restitution to victim A and her insurance company; defendant contended that, because he had been acquitted of aggravated assault, trial court erred in ordering him to pay restitution; court held that, even though drive-by shooting is "victimless" crime, victim A was injured by defendant's drive-by shooting, therefore she was entitled to receive restitution).

Ariz. Const. art. 2, sec. 8. Right to privacy.

az.2.8.020 Except for cases involving homes, Arizona courts have not yet held Article 2, section 8, grants broader protections against search and seizure than those available under the federal constitution.

State v. Johnson, 220 Ariz. 551, 207 P.3d 804, ¶¶ 11–15 (Ct. App. 2009) (officers conducted valid traffic stop, wherein defendant was passenger; officer asked defendant to exit vehicle in order to gain information about gang activity in area; once defendant exited vehicle, officer patted down defendant and found gun on him; because stop occurred in area associated with Crips gang, defendant was wearing blue, which is the Crips color, defendant was from Eloy, where Crips gang was active, it was reasonable for officer to suspect defendant was gang member, and officer knew gang members often carry guns; additionally, defendant told officer he been to prison and had been released about a year ago, and was carrying police scanner; court held that, based on all factors then known to officer, it was reasonable under United States Constitution for officer to conduct pat-down search; court further held that, under Arizona Constitution, there was no reason to depart from rules announced under United States Constitution).

az.2.8.160 If the police have engaged in illegal conduct and the defendant subsequently consents to a search, the court must look at three factors to determine whether the taint of the illegal conduct is sufficiently attenuated from the evidence subsequently obtained: (1) the time elapsed between the illegal conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

State v. Guillen, 2010 WL 132543 ¶¶ 13–23 (Jan. 15, 2010) (officers received information that defendant was storing marijuana in his garage; when defendant and his wife were not home, officers brought narcotics dog to sniff outside of garage, whereupon dog alerted on garage; when defendant's wife returned, officers asked if they could search premises, and she consented; after narcotics dog alerted on freezer, officers obtained search warrant and discovered bales of marijuana in two other freezers; court began by assuming, without deciding, that dog sniff violated Article 2, Section 8; court then held

that intervening circumstances obviated any alleged taint, specifically because wife was unaware of dog sniff when she consented, and that first dog sniff conducted from outside garage was not flagrant police conduct, thus trial court did not err in denying motion to suppress marijuana).

Ariz. Const. art. 2, sec. 22. Bailable offenses.

az.2.22.030 The purposes of bail are (1) to assure the appearance of the accused, (2) to protect against intimidation of witnesses, and (3) to protect the safety of the victim, any other person, and the community; because the source of the pledged property or cash may affect whether the accused does appear in the future, the trial court has the authority to order the defendant to disclose source of funds used to post bail.

State v. Donahoe (Garibaldi-Osequera), 220 Ariz. 126, 203 P.3d 1186, ¶¶ 10–17 (Ct. App. 2009) (because pledged property or cash that comes from illegal activity may not in fact secure defendant’s future appearance because defendant would have no legal right to pledged property or cash and losing it would be of no consequence and defendant may view forfeiture simply as cost of doing business, trial court has authority to order defendant to disclose source of funds used to post bail).

Ariz. Const. art. 2, sec. 23. Trial by jury—Right to a jury.

az.2.23.rj.020 To determine whether the offense mandates a jury trial, the court should consider two things: **First**, under Article 2, section 23, whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.

Sulavka v. State, 223 Ariz. 208, 221 P.3d 1022, ¶¶ 13–18 (Ct. App. 2009) (court held that shoplifting had substantially similar elements with common-law larceny, thus defendant was entitled to jury trial for shoplifting).

Ariz. Const. art. 2, sec. 23. Trial by jury—Number of jurors.

az.2.23.nj.010 If the possible punishment is death or 30 years or more, the defendant is entitled to a 12-person jury; in all other cases, the defendant is entitled to not less than an 8-person jury pursuant to A.R.S. § 21–102(B).

State v. Diaz, 2010 WL 476010 ¶¶ 11–17 (Feb. 12, 2010) (trial court impaneled 15 jurors; at close of case, trial court excused three jurors and told jurors that “[a]ll 12 of you must agree on a verdict”; at point when jurors reconvened next day, record was silent on whether all 12 jurors were present; when jurors returned their verdict, trial court noted “the presence of the jury” and *sua sponte* polled jurors; transcript, however, only contained names of 11 jurors; after court of appeals issued its opinion reversing conviction, court reporter submitted revised showing all 12 jurors were polled; court held that even uncorrected record taken as a whole failed to show that only 11 jurors participated, thus no error).

State v. Escobedo, 222 Ariz. 252, 213 P.3d 689, ¶¶ 2, 9, 20–23, 48 (Ct. App. 2009) (court analyzed Arizona Supreme Court cases to determine whether court used conjunctive or disjunctive test to determine whether error is structural; court held that failure to impanel jury of 12 persons is not structural error, and must instead be reviewed under fundamental error analysis), *aff’d*, 2010 WL 532342 (Ct. App. Feb. 16, 2010).

State v. Provenzano, 221 Ariz. 364, 212 P.3d 56, ¶¶ 7–16 (Ct. App. 2009) (defendant had four prior felony convictions, at least two of which would have qualified as aggravating factors; because trial court was correct that multiple felonies could count as only one aggravating factor, maximum sentence on each of defendant's two convictions was 12 years, rather than 15 years if more than one aggravating factor, thus defendant was entitled only to eight-person jury).

az.2.23.nj.020 Under the Sixth Amendment, for a trial under state law, the defendant is not entitled to a 12-person jury.

State v. Escobedo, 222 Ariz. 252, 213 P.3d 689, ¶¶ 10, 19, 23 (Ct. App. 2009) (court reviewed United States Supreme Court case that held that trial by six-person jury did not violate Sixth Amendment as applied to States through Fourteenth Amendment), *aff'd*, 2010 WL 532342 (Ct. App. Feb. 16, 2010).

az.2.23.nj.030 If the charges and enhancements are such that the defendant could receive a possible punishment of 30 years or more, if the trial court impanels only an eight-person jury and there is no objection, if the trial court may legally impose a sentence of less than 30 years, then a sentence of 30 years or more is no longer permitted and the requirement of a 12-person jury no longer applies.

State v. Soliz, 223 Ariz. 116, 219 P.3d 1045, ¶¶ 12–18 (2009) (defendant was charged with possession of dangerous drugs for sale; with allegation of prior convictions, defendant could have received maximum sentence of 35 years; trial court impaneled only eight-person jury and neither defendant nor state objected; after jurors convicted defendant, state declined to prove defendant's prior convictions or any aggravating circumstances; trial court imposed presumptive sentence of 10 years; court held that defendant's maximum sentence thereby was limited to less than 30 years, thus there was no error in impaneling eight-person jury).

Ariz. Const. art. 2, sec. 24. Rights of an accused—Presence at trial.

az.2.24.pt.020 A defendant has a constitutionally guaranteed right to be present at any stage in the criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 6–13 (Ct. App. 2009) (defendant appeared at sentencing by interactive audiovisual system; court held trial court erred in holding sentencing without defendant physically present; because defendant did not object, court reviewed for fundamental error, and because it found defendant failed to show prejudice, affirmed sentence).

az.2.24.pt.040 A defendant may waive the right to be present at sentencing as long as the defendant makes a knowing, voluntary, and intelligent waiver.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 12–13 (Ct. App. 2009) (at sentencing, defendant appeared by interactive audiovisual system; court noted that defendant never made personal waiver of right to be present, and thus held trial court erred in holding sentencing without defendant physically present).

az.2.24.pt.050 A defendant may forfeit the right to attend judicial proceedings if, after being warned by the court, the defendant continues to behave in such a disorderly, disruptive, or disrespectful way that the proceedings cannot take place with the defendant present.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 9–10 (Ct. App. 2009) (at sentencing, defendant appeared by interactive audiovisual system; court noted that, although defendant was disruptive at initial appearance, he was cooperative at violation hearing, thus his behavior at earlier hearing, standing alone, was not sufficient grounds for excluding him from sentencing hearing).

Ariz. Const. art. 2, sec. 24. Rights of an accused—Trial by jury.

az.2.24.rj.090 If the trial court states that it will not impose a sentence greater than 6 months, under federal law the defendant is not entitled to a jury trial.

State v. Soliz, 223 Ariz. 116, 219 P.3d 1045, ¶ 15 (2009) (court analyzed federal case law in support of its reasoning; in present case, defendant was charged with possession of dangerous drugs for sale; with allegation of prior convictions, defendant could have received maximum sentence of 35 years; trial court impaneled only eight-person jury and neither defendant nor state objected; after jurors convicted defendant, state declined to prove defendant's prior convictions or any aggravating circumstances; trial court imposed presumptive sentence of 10 years; court held defendant's maximum sentence thereby was limited to less than 30 years, thus there was no error in impaneling eight person jury).

Ariz. Const. art. 2, sec. 30. Indictment of information; preliminary examination.

az.2.30.010 A person may not be prosecuted in any court of record for a felony or misdemeanor without an information or indictment; this is, however, only a personal right to the defendant and is not a requirement for the trial court to obtain jurisdiction.

State v. Maldonado, 2010 WL 27033 ¶¶ 7–26 (Jan. 7, 2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded that Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

Article 3. Separation of powers — Courts may not usurp the executive.

az.3.ce.050 The judicial branch has the power to control the courts and those under its authority, and the executive branch has the power to administer the state and control those under its authority.

Trombi v. Donahoe, ___ Ariz. ___, 222 P.3d 284, ¶¶ 22–24 (Ct. App. 2009) (trial court ordered sheriff to have jail inmates present in court for morning calendar; when sheriff failed to do so, trial court held deputy sheriff in contempt; court held trial court's order for attendance of jail inmates was permissible under § 11–441(A)(4), which requires sheriff to attend court, and did not affect sheriff's authority under § 11–441(A)(5) to operate jails, and thus order did not violate separation of powers).

Article 3. Separation of powers — Legislature may not usurp the courts.

az.3.lc.050 The legislature may change a statute for prospective application, but the separation of powers doctrine precludes the legislature from overruling or changing a judicial interpretation of a statute and apply it on a retroactive basis.

State v. Montes, 2009 WL 5159762, ¶¶ 4–15 (Ct. App. Dec. 31, 2009) (Senate Bill 1449, effective September 30, 2009, sought to nullify holding of *Garcia v. Browning* and make previous amendment to § 13–205(A) “retroactively applicable to all cases in which the defendant did not plead guilty or no contest and that were pending . . . on April 24, 2006;” defendant committed his offenses September 11, 2005; because defendant committed his offenses prior to April 24, 2006, and his trial began after that date, trial court required defendant to prove that he acted in self-defense; defendant was convicted and appealed; court affirmed conviction on September 18, 2009, and defendant filed motion for reconsideration, which was pending on September 30, 2009; defendant contended Senate Bill 1449 was change in law that entitled him to new trial; court held Senate Bill 1449 was unconstitutional and thus did not entitle defendant to any relief).

Article 6, section 1. Judicial power; courts.

az.6.1.010 The Arizona Constitution gives the legislature the power to establish intermediate courts and to determine the scope of their powers.

Rogers v. Cota, 223 Ariz. 44, 219 P.3d 254, ¶¶ 5–11 (Ct. App. 2009) (legislature created courts “inferior to the superior court,” and provided they would have jurisdiction over misdemeanors and criminal offenses punishable by fine not exceeding \$2,500; court held that, because legislature had power to set jurisdictional limits, it had power to provide that any penalty or other added assessment levied would not be considered part of fine for purposes of determining jurisdiction, thus fact that added to mandatory minimum DUI fine of \$1,000 was 84% surcharge and three additional assessments totaling \$2,750 did not deprive municipal court of jurisdiction).

az.6.1.030 The Arizona courts have only that jurisdiction conferred by law, and the parties may not, by agreement, confer on a court subject matter jurisdiction that it otherwise would not have.

In re Jury Selection Process, 220 Ariz. 526, 207 P.3d 779, ¶¶ 6–9 (Ct. App. 2009) (in 2002, then presiding judge of Maricopa County Superior Court implemented jury selection system that “regionalized” jury selection process rather than having it county wide; by 2006, attorneys and parties in Maricopa County realized what was happening, and filed motions in individual cases challenging procedure; in 2006, then presiding judge of Maricopa County Superior Court issued order providing that all these identical claims would be combined and resolved by one out-of-county judge; case was given new civil cause number, and identified 37 individual cases; judge ruled that jury selection system did not violate statutory scheme, and parties who had individual cases appealed; court stated it would have jurisdiction for this issue in any one of the 37 cases where it was present, but that in present action, there was no final judgment in any completed action, thus appellate court did not have jurisdiction).

Article 6, section 14. Superior court; original jurisdiction.

az.6.14.020 Subsection (4) grants the superior court subject matter jurisdiction of criminal cases amounting to a felony, and cases of misdemeanor not otherwise provided for by law.

State v. Maldonado, 2010 WL 27033, ¶¶ 7-26 (Jan. 7, 2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

Trombi v. Donahoe, ___ Ariz. ___, 222 P.3d 284, ¶¶ 3-6, 18-21 (Ct. App. 2009) (trial court ordered sheriff to have jail inmates present in court for morning calendar, and when sheriff failed to do so, trial court held deputy sheriff in contempt; court held trial court had jurisdiction to entertain or decide orders to show cause for contempt cases).

State v. Silva, 222 Ariz. 457, 216 P.3d 1203, ¶¶ 8-10 (Ct. App. 2009) (defendant contended trial court did not have jurisdiction because it ordered three separate restoration periods totaling over 32 months, which exceeded 21 months allowed by statute; court held that, because defendant was charged with felony offense, trial court had jurisdiction).

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 29-32 (Ct. App. 2009) (defendant purchased merchandise using gift cards that had been altered so that information encoded on magnetic strips corresponded to various credit and debit cards belonging to other persons; defendant was charged with falsely using credit card under § 13-2104(A)(2); trial court instructed jurors not only for § 13-2104(A)(2), but also on altering credit card under § 13-2104(A)(1); defendant contended on appeal that trial court lacked subject matter jurisdiction to convict him under section (A)(1); court held that, because offense under section (A)(1) was felony offense, trial court had subject matter jurisdiction to convict defendant of that offense).

Article 6, section 27. Charge to juries; reversal of cause for technical errors—Harmless error.

az.6.27.030 No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.

State v. Chacon, 221 Ariz. 523, 212 P.3d 861, ¶¶ 9-11 (Ct. App. 2009) (defendant was placed on probation 9/24/04 for 3 years; on 7/23/07, probation officer prepared petition to revoke, which commissioner signed 8/21/07, but it was not filed with clerk of court until 1/16/08; on 9/20/07, probation officer prepared second petition to revoke alleging different grounds, but that petition was never signed by the trial court nor filed with clerk of court; at hearing 11/02/07, state dismissed 7/23/07 petition and stated it wished to proceed on 9/20/07 petition; trial court found defendant had violated his probation and placed defendant on intensive probation; court held that, because state dismissed 7/23/07 petition and because 9/20/07 petition was never filed, trial court did not have jurisdiction to revoke probation once probation expired on 9/24/07; state contended any error was harmless because defendant had notice of allegations against him and participated in revocation proceedings; court held that lack of jurisdiction can never be harmless; and so court vacated trial court's finding of probation violation).